COMMONWEALTH OF KENTUCKY
SUPREME COURT

Case No. 2015-SC-000408
Court of Appeals Case No. 2015-CA-000221-CA

Appeal from Pike Circuit Court
Civil Action No. 13-CI-1145

JOHN DOE NO. 1 AND JOHN DOE NO. 2 — **APPELLANTS**

V. **BRIEF FOR APPELLEE WILLIAM HICKMAN, III**

HON. EDDY COLEMAN
Pike Circuit Court, Division I — **APPELLEE**

AND

WILLIAM HICKMAN, III — **APPELLEE/ REAL PARTY IN INTEREST**

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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed, postage prepaid, to the following on this the 16th day of October, 2015: Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-3488; Lawrence R. Webster, Esq., P.O. Drawer 712, Pikeville, Kentucky 41502; Hon. Eddy Coleman, Judge, Pike Circuit Court, Pike County Judicial Center, 175 Main Street, Pikeville, Kentucky 41501.

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STATEMENT CONCERNING ORAL ARGUMENT

The Appellee does not believe that oral arguments are necessary in this matter. The Court of Appeals set forth a clear standard in its June 20, 2014 Opinion and Order and the Circuit Court thereafter properly applied that standard to the facts at issue, as recognized by the Court of Appeals in its June 25, 2015 Order denying the Appellants' second Petition for a Writ of Prohibition. Review of the parties' briefs and the underlying decisions will adequately demonstrate to this Court that the Court of Appeals set out the proper standard (a matter that the Appellants have conceded), that the trial court appropriately applied that standard and that the June 25, 2015 Order of the Court of Appeals should therefore not be disturbed.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

The Appellee/Real Party in Interest, William Hickman, III ("Mr. Hickman" or the "Appellee"), by counsel, for his Appellee's Brief and in opposition to the Brief for Appellants filed by the Appellants, John Doe No. 1 and John Doe No. 2 (collectively, the "Appellants"), respectfully states as follows:

COUNTERSTATEMENT OF THE CASE

This matter is in its second year of life, having been filed by Mr. Hickman in the Pike Circuit Court on October 16, 2013, yet no significant activity has yet taken place because of the Appellants' dogged refusal to accept what the Court of Appeals has made clear – that Mr. Hickman is entitled to serve subpoenas intended to reveal the identities of those who have anonymously posted defamatory comments about him on the Topix website. As a result of the Appellants' first Petition for a Writ of Prohibition against these subpoenas, the Court of Appeals set forth the standard that Mr. Hickman was required to meet for issuance of the subpoenas. In summary, and as set forth and discussed in detail below, the Court of Appeals held that in order to compel disclosure of anonymous speakers, a plaintiff must make reasonable efforts to notify the anonymous parties of the subpoeanas and allow them to respond, and must demonstrate to the trial court a prima facie case for defamation, which in this context requires demonstrating facially defamatory statements that are false. This standard adopted by the Court of Appeals was not challenged by the Appellants, despite their now-stated belief that the standard was insufficient, and is therefore now the law of this case. The time for the Appellants' current arguments has long-since passed. As correctly recognized by the Court of Appeals in its most recent Order related to this matter, the trial court carefully

heeded this standard established by the Court of Appeals, applied the standard to the facts at issue and ruled that the subpoenas could issue.

The Appellants nevertheless sought a second Petition for Writ of Prohibition against enforcement of the Circuit Court's Order allowing Mr. Hickman to discover the identities of the Unknown Defendants, including the Appellants. The Court of Appeals denied the Appellants' request, and in so doing found that the Circuit Court had indeed appropriately applied the law of the case established by the Court of Appeals had established in its earlier ruling to the facts at issue. The Appellants now seek review of that Court of Appeals Order by this Court. For the reasons set forth below, Mr. Hickman respectfully submits that the Court of Appeals correctly established the appropriate standard to be applied in a situation such as this, that the Pike Circuit Court correctly applied that standard in granting Mr. Hickman leave to serve subpoenas to discover the Appellants' identities, and that the Court of Appeals' recognition of these facts through its denial of the second Petition for Writ of Prohibition should be allowed to stand as entered.

A. The Circuit Court Proceedings.

Mr. Hickman has served the Pike County and Pikeville communities both as an attorney and on the Board of Directors of the Pikeville/Pike County Airport (the "Airport Board"). See Complaint, attached at Appendix Tab 1, ¶¶8-9. Mr. Hickman has been Chair of the Airport Board since 2009. Id., ¶9. His service has been exemplary and obviously much-appreciated, given his long tenure. Defamatory, personal attacks against Mr. Hickman by the defendants below, including the Appellants, who are anonymous posters on Topix, continued, to the extent that Mr. Hickman could no longer tolerate (or

afford) the damage being done to his reputation. He therefore filed the underlying action, and immediately thereafter sought the identity of the Unknown Defendants through properly-served and noticed subpoenas.

The Pike Circuit Court denied the Motion to Quash those subpoenas filed by the Appellants, designated as "John Doe #1" and "John Doe #2." See February 4, 2014 Pike Circuit Court Order, attached at Appendix Tab 2. However, the Circuit Court also ordered:

> John Doe #1 and John Doe #2 shall have 20 days to file a petition for writ of prohibition. Their identities should not be disclosed until this time has expired or until there is a final ruling on any petition that the unknown defendants may file.

Id., pp. 1-2.

B. The First Proceeding For Writ.

Thereafter, the Appellants did indeed file an Original Proceeding for Relief in the Nature of a Writ Pursuant to CR 76.36, Case No. 2014-CA-293 (the "First Writ Proceeding"). In the First Writ Proceeding, the Appellants claimed that irreparable harm would result to them if their identities are revealed. The First Writ Proceeding was fully briefed by the Appellants and Mr. Hickman, and on June 20, 2014, the Court of Appeals issued its Opinion and Order Granting Petition for Writ of Prohibition (the "First Court of Appeals Order"). See Doe v. Coleman, 436 S.W.3d 207 (Ky. App. 2014), attached for the Court's convenience at Appendix Tab 3.

Although the Court of Appeals granted the Appellants' requested relief, it included in its Opinion a directive to the Circuit Court to conduct an analysis of Mr. Hickman's claims in order to determine if issuance of the subpoenas at issue is

appropriate under the standard that the Court of Appeals directed should be followed. Specifically:

> Based on the foregoing, we conclude that John Doe No. 1 and John Doe No. 2 have demonstrated entitlement to a writ because the trial court ordered disclosure of their identities without requiring Hickman to demonstrate a prima facie case for defamation under the standard set forth above. Therefore, the Court ORDERS that the petition for writ of prohibition be, and it is hereby, GRANTED. The trial court is DIRECTED to conduct an analysis consistent with the standard set forth in this order.
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> Coleman, supra, 436 S.W.3d at 212 (emphasis added).

C. The Motion For Leave To Serve Subpoenas.

In light of the First Court of Appeals Order, on or about November 5, 2014, Mr. Hickman filed in the Circuit Court action a Motion for Leave to Serve Subpoenas Duces Tecum to Discover Identities of Defendants, Unknown Users of Topix Social Media Website, and a Memorandum in Support (the "Subpoena Motion"). The Subpoena Motion was fully briefed by Mr. Hickman and the Appellants, and a hearing was held before the Pike Circuit Court. Thereafter, on January 14, 2015, the Pike Circuit Court entered an extensive Order (the "Subpoena Order"), attached at Appendix Tab 4, discussed in more detail below. After carefully analyzing the parties' arguments, the Court of Appeals' directives as set forth in the First Court of Appeals Order, and each Topix post at issue, the Pike Circuit Court concluded that Mr. Hickman had demonstrated a prima facie case for defamation as to each such post, and ordered as follows:

> The Court having considered the parties' written and oral arguments, having considered the Opinion and Order of the Court of Appeals, having reviewed each of the Topix posts at issue, and being otherwise duly and sufficiently advised,

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

A. The Plaintiffs' Motion for Leave to Serve Subpoenas Duces Tecum to Discover Identities of Defendants, Unknown Users of Topix Social Media Website, is GRANTED, except as herein ordered, and the Plaintiff may proceed to serve Subpoenas Duces Tecum on Internet Service Providers listed herein above in order to determine the identities of the Unknown Defendants; and

B. Because two of the Unknown Defendants, designated John Doe #1 and John Doe #2, have retained counsel to appear on their behalf in this matter, said counsel is directed to disclose to the Court and to the Plaintiff's counsel the identity of John Doe #1 and John Doe #2, and to identify which of the posts at issue were posted by each, within 20 days of the entry of this Order.

C. The identities of the Defendants shall not be disclosed until 20 days have expired or until there is a final ruling if a petition [sic] filed by the Defendant in the Court of Appeals seeking relief from this Order.

Subpoena Order, Appendix Tab 4, p. 25.

D. <u>The Second Proceeding For Writ</u>.

Within the timeframe established by the Circuit Court, the Appellants filed a second Original Proceeding for Relief in the Nature of a Writ Pursuant to CR 76.36, Case No. 2015-CA-221 (the "Second Writ Proceeding"). In the Second Writ Proceeding, the Appellants again asserted that irreparable harm would result to them if their identities are revealed, that Mr. Hickman had not met the standard established by the Court of Appeals and, <u>for the first time</u>, that the standard established by the Court of Appeals did not go far enough. The Second Writ Proceeding was fully briefed by the Appellants and Mr. Hickman, and on June 25, 2015, the Court of Appeals issued its Order Denying Petition for Writ of Prohibition (the "Second Court of Appeals Order"), attached at Appendix Tab 5.

The crux of the Second Court of Appeals Order was that Mr. Hickman had in fact demonstrated a prima facie case for defamation under the standard established in the First Court of Appeals Order, and that the statements at issue are not merely opinion.[1] See Second Court of Appeals Order, Appendix Tab 5, p. 4. The Court of Appeals also rejected the Appellants' argument that the attorney-client privilege should protect their identities. See id., pp. 9-10. Finally, the Court of Appeals appropriately disregarded in its entirety the Appellants' argument that the Appellee should have been required to demonstrate damages, as that was not part of the First Court of Appeals Order and the absence of that element from the First Court of Appeals Order was not appealed or otherwise challenged by the Appellants.

For the reasons set forth below, Mr. Hickman respectfully submits that the Pike Circuit Court's application of the standard established by the Court of Appeals to the facts at issue correctly resulted in a finding that Mr. Hickman has made out a prima facie case for defamation, and that the Court of Appeals' recognition of the trial court's efforts and its resulting denial of the relief requested in the Second Writ Proceeding was likewise appropriate and should not be disturbed.

STANDARD OF REVIEW

A. The Standard Of Review Is Abuse Of Discretion.

The Appellants state that the Court should review the Second Court of Appeals Order utilizing the de novo standard of review, because "this case does not involve

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[1] The Appellants set out the posts at issue in the "Statement Of The Case" section of their brief. However, the Appellee believes that demonstrative examples of the posts, and the validity of the Court of Appeals' assessment of those posts, is more appropriately included with the Appellee's legal arguments and will therefore include discussion and, where appropriate, quoted posts in the Argument portion of his Brief.

application of the law to the facts." See Appellants' Brief, p. 13 (citing New v. Commonwealth, 156 S.W.3d 769 (Ky. App. 2005)). However, the New case involved an appeal to the Court of Appeals from a Franklin Circuit Court decision. See New, supra, 156 S.W.3d at 770-71. The standards of review applicable to appeals from a Court of Appeals decision in a Writ proceeding have been delineated by this Court as follows:

> Thus, it is apparent that the proper standard actually depends on the class, or category, of writ case. De novo review will occur most often under the first class of writ cases, i.e., where the lower court is alleged to be acting outside its jurisdiction, because jurisdiction is generally only a question of law. De novo review would also be applicable under the few second class of cases where the alleged error invokes the "certain special cases" exception or where the error involves a question of law.
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> Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004).

If the Appellants' position is that this appeal involves a question of law, i.e., what is the correct standard to be applied by the Circuit Court in determining whether to allow Mr. Hickman to discover the Appellants' anonymity, then this appeal is "too little, too late." The Court of Appeals established the appropriate standard in its First Opinion, on June 20, 2014, which standard is now the law of this case. If the Appellants believed that standard was incorrect, incomplete or otherwise in error, the time for appeal was within thirty days of June 20, 2014. Instead, the Appellants accepted the Court of Appeals' mandate, and they have waived any argument that the applicable standard should be changed.

In other words, the Appellants could have questioned the law established by the Court of Appeals sixteen months ago but chose not to, and they cannot now claim that this matter involves a question of law. The law is established – the only question that can remain is whether the Circuit Court, as confirmed by the Court of Appeals, correctly

applied that law to the facts at issue. In such a case, the appropriate standard of review is abuse of discretion:

> But in most of the cases under the second class of writ cases, i.e., where the lower court is acting within its jurisdiction but in error, the court with which the petition for a writ is filed only reaches the decision as to issuance of the writ once it finds the existence of the "conditions precedent," i.e., no adequate remedy on appeal, and great and irreparable harm. "If [these] procedural prerequisites for a writ are satisfied, 'whether to grant or deny a petition for a writ is within the [lower] court's discretion.'"
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> Trude, supra, 151 S.W.3d at 810 (quoting Rehm v. Clayton, 132 S.W.3d 864, 866 (Ky. 2004)) (other citations omitted).

A third standard sometimes also applies in appeals from writ proceedings. "[I]f on appeal the error is alleged to lie in the findings of fact, then the appellate court must review the findings of fact for clear error before reviewing the decision to grant or deny the petition." Trude, supra, 151 S.W.3d at 810 (citing Ky. R. Civ. P. 52.01). However, Mr. Hickman respectfully submits that the Court of Appeals did not make independent findings of fact, but rather confirmed the trial court's findings of fact and the application of the law to those facts. In any event, the Appellants' proposition that the most stringent standard – de novo review – applies in this case is either misplaced or, as explained above, demonstrates that the Appellants disagree with the law established in the First Court of Appeals Order, in which case this appeal should be dismissed as untimely and outside the scope of Rule 76.01(7) of the Kentucky Rules of Civil Procedure. Otherwise, the appropriate standard of review is abuse of discretion.

ARGUMENT

I. WRONGFUL DISCLOSURE OF THE APPELLANTS' IDENTITIES WOULD CONSTITUTE IRREPARABLE HARM.

Mr. Hickman does not dispute the Court of Appeals' finding in its First and Second Orders that "[t]he erroneous disclosure of the identities of anonymous speakers constitutes irreparable harm that cannot be vindicated by appeal from a final judgement because 'once the information is furnished, it cannot be recalled.'" Second Court of Appeals Order, Appendix Tab 5, p. 4 (quoting Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 800 (Ky. 2000)) (other citation omitted). The erroneous removal of the Appellants' identities could not be "undone," and Mr. Hickman has never questioned the importance of free speech and indeed even anonymous free speech in these proceedings. The difference, of course, is that not all anonymous speech is protected, and Mr. Hickman has demonstrated that he has met the applicable threshold for removing that anonymity on the part of the Appellants. The review has been careful, considered and certainly thorough – erroneous identification would be impossible to correct, but in this case, no such error has been made and the identities should be discoverable.

II. THE COURT OF APPEALS ESTABLISHED THE SCRUTINY TO WHICH THE ALLEGATIONS OF DEFAMATION MUST BE SUBJECTED IN ORDER TO REVEAL ANONYMOUS SPEAKERS' IDENTITIES IN THE CONTEXT OF A PUBLIC FIGURE, AND MR. HICKMAN MET THAT STANDARD.

In the First Court of Appeals Order, the Court adopted the test set forth in Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), as modified by Doe v. Cahill, 884 A.2d 451 (Del. Sup. Ct. 2005) for striking "the proper balance between the First Amendment right to engage in protected anonymous speech

and the right to seek legal redress for actionable defamatory speech." Coleman, supra, 436 S.W.3d at 211.

The Appellants call this "special scrutiny" and suggest that the test involves weighing "the concreteness of the showing of a prima facie case in order to balance the defendant's First Amendment rights of anonymous free speech against the strength of that case." See Appellants' Brief, p. 14. The Appellants also argue that a defamation plaintiff seeking to discover the identity of anonymous speakers is required to meet "certain special requirements and not get by with providing to a trial court more" and that the "court is not permitted to breach anonymity until a plaintiff meets certain special requirements." Id. (emphasis added). Unfortunately for the Appellants, this is not what the First Court of Appeals Order held.

The Appellants also go on to cite to cases that the Court of Appeals simply did not adopt in its June 2014 Opinion, including Arista Records, LLC v. Doe, 604 F.3d 110, 119 (2nd Cir. 2010) (subpoena must be quashed unless "the concreteness of the Plaintiff's showing of a prima facie case of actual harm" is established); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (facts must be amplified sufficiently to render a claim plausible on its face);[2]

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[2] Appellants' pinpoint cite for this provision in the Iqbal case is to page 570, however that page number does not exist in any of the three Supreme Court reporters for this case (556 U.S. 662; 129 S.Ct. 1937; 173 L.Ed.2d 838). Apparently the Appellants are citing to that portion of the Iqbal case that references Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007): "Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.' '[D]etailed factual allegations' are not required but the Rule does call for sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, supra, 556 U.S. at 663 (citing and quoting Twombly, supra, 550

Sony Music Entertainment Inc. v. Does 1-40, 326 F.Supp.2d 556, 564-65 (S.D.N.Y. 2004) (court must evaluate the prima facie strength of a Plaintiff's claim of actionable harm); Dendrite, supra, 775 A.2d 756 (Plaintiff must produce sufficient evidence to support each element of its cause of action and show harm by sufficient evidence). However, these cases also do not represent the Court of Appeals' (unchallenged) recitation of the standard to be applied in this context – the determination of whether a public figure plaintiff should be entitled to discover the identity of those making anonymous comments against him in a defamation lawsuit – and Appellants' desired standard cherry-picked from these varied cases goes far beyond what the Court of Appeals actually required:

> Accordingly, we hold that before a plaintiff can compel disclosure of the identity of an anonymous internet speaker, the plaintiff must:
>
> > (1) undertake reasonable efforts to notify the anonymous defendant that he is the subject of a subpoena or application for an order of disclosure and must withhold action in order to allow the anonymous defendant an opportunity to respond; and
> >
> > (2) set forth a prima facie case for defamation under the summary judgment standard as set forth in Justice Keller's concurring opinion in Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 731 (Ky. 1999), to the extent those elements are under his control.
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> Coleman, supra, 436 S.W.3d at 211
> (citing Cahill, supra, 884 A.2d at 461).[3]

U.S. at 556 and 570). Clearly this provision relates to the sufficiency of a Complaint under Federal Rule 8, and has no applicability in this context.

[3] In the Supreme Court concurring and dissenting opinion in Welch, supra, referenced by the Court of Appeals in the First Court of Appeals Order, Justice Keller very clearly reiterated the extremely high standard that a party seeking Summary Judgment must meet: "To prevail on a motion for summary judgment, Hall and Pursiful must demonstrate that 'it would be impossible for [Welch] to

The Court of Appeals further instructed that, in order to present a prima facie case for defamation,

> the plaintiff who is a public figure must produce evidence that "(1) the language... [at issue] contains facially defamatory statements; (2) those facially defamatory statements are false; and (3) the persons responsible for those statements acted 'with knowledge that [the statements were] false or with reckless disregard of whether [they were] false or not.'" Elements one and two are elements that the plaintiff should be able to establish without discovery of the speaker's identity. The third element, however, is likely to be difficult, if not impossible, for a public figure plaintiff to satisfy without knowing the speaker's identity. Therefore, we hold that a public figure defamation plaintiff must only plead and prove facts with regard to the first two elements to compel disclosure of the speaker's identity, i.e., "the elements of the claim that are within his control."
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> Id. at p. 211-12 (citing and quoting Welch, supra, 3 S.W.3d at 731 (Keller, J. concurring in part, dissenting in part); New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); Cahill, supra, 884 A.2d at 464) (emphasis added).

Based upon these instructions, Mr. Hickman presented to the Pike Circuit Court evidence that the Topix posts at issue contain facially defamatory statements that are false. This is all that was required, and Mr. Hickman more than established both elements as to each post, which the Court of Appeals recognized in denying the requested writ.

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produce evidence at trial warranting a judgment in his favor.'" Welch, supra, 3 S.W.3d at 731 (Keller, J. concurring in part, dissenting in part) (citing and quoting Steelvest, Inc. v. Scansteel Serv. Ctr., 807 S.W.2d 476 (Ky. 1991); CR 56.03). In sum, Mr. Hickman must produce evidence of defamatory statements, after which the Appellants must demonstrate that, given that evidence, it would still be impossible for Mr. Hickman to prevail at trial. Nothing in the Appellants' Brief or in any of the underlying proceedings has demonstrated that it would be impossible for Mr. Hickman to prevail on his claims against them and the other Unknown Defendants at trial, and as the Circuit Court recognized and the Court of Appeals accepted, Mr. Hickman has therefore made out the necessary prima facie case such that he should be permitted to discover the Unknown Defendants' identities.

A. Application Of The Standard To The Facts.

1. The Court Of Appeals Correctly Accepted The Circuit Court's Finding That Each Of The Statements At Issue Is Facially Defamatory.

Words are defamatory when they tend to "(1) bring a person in to public hatred, contempt or ridicule; (2) cause him to be shunned or avoided; or, (3) injure him in his business or occupation." McCall v. Courier-Journal and Louisville Times Co., 623 S.W.2d 882, 884 (Ky. 1981) (emphasis added).[4] The Circuit Court correctly found that each of the subject posts include facially defamatory statements. However, before assessing each of the subject posts, the Circuit Court provided a clear, concise statement refuting the Petitioners' three arguments against disclosure of their identities, which statement demonstrates that the Circuit Court thoughtfully considered and applied the mandates set forth in the First Court of Appeals Order:

> Basically, the Defendants have raised three objections. First, the Defendant argues that the Plaintiff has not demonstrated any actual or special damages. On page 8 of its opinion, the Court of Appeals set out the elements the Court must find to require disclosure of the Defendants' identities and those elements do not include a finding [of] proof of actual or special damages. Second, the Defendant argues that several of the statements were opinion only because the words stink and apparently are used. Of course, it would stink if the allegations that the Plaintiff misappropriated public funds for personal use of himself and others were true. Saying that something stinks does not make the factual assertions opinion; it merely states an opinion about the factual assertions. Third, the

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[4] As referenced above, the Appellants make much of the "fact" that Mr. Hickman has not demonstrated damage, arguing that because a Defendant's knowledge of the falsity or reckless disregard for the truth of an allegedly defamatory statement cannot be determined at this stage in the proceedings, the Plaintiff must instead prove special or actual damage. However, this is completely contrary to the McCall, supra, case, which lists the three factors that demonstrate defamatory speech as alternatives. In addition, and as explained below, the Circuit Court addressed this allegation and correctly noted that the First Court of Appeals Order does not require a finding of actual or special damages. See Subpoena Order, Appendix Tab 4, p. 2.

> Defendant defends the statements with factual argument unsupported by affidavit or any other proof whatsoever. Even if the Court believes there may be proof available to support the Defendants' unsupported counter-statement of facts, those issues are for a jury. This Court is to determine whether there is a *prima facie* case, a review of the facts much like what a court would do when presented with a motion for directed verdict at the conclusion of the plaintiff's proof.
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> The Court finds that the statements are on their face defamatory and that the Defendant has produced evidence by affidavit that they are false.
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> Subpoena Order, Appendix Tab 4, p. 2.

The Appellants set out the subject posts in their Brief, and representative posts were also quoted by the Court of Appeals in the Second Court of Appeals Order. For this Court's convenience, the transcribed posts and Mr. Hickman's Affidavit (the "Hickman Aff.") are included at Tab 6 in the attached Appendix. The Circuit Court addressed each post in detail in the Subpoena Order, and set out the reasoning behind its finding that each such post is facially defamatory and false, and that Mr. Hickman therefore made out a prima facie case as required in the First Court of Appeals Order.

2. <u>The Use Of A Sworn Affidavit Was Appropriate</u>.

The Court of Appeals chose representative examples and analyzed them in detail. To detail these findings again herein would be unnecessarily tedious and repetitive. What is important to note, however, is that in the case of each post the Circuit Court reviewed the language, reviewed the Court of Appeals' mandated standard, applied the standard to the words and detailed how Mr. Hickman had established a prima facie case under the First Court of Appeals Order as to each post. The Court of Appeals likewise reviewed each post and the Circuit Court's finding as to each post, and essentially confirmed those findings one by one. The Appellants make much of the fact that Mr. Hickman supported his allegations with a sworn affidavit, and state without legal authority or support that "a

conclusory affidavit is insufficient proof for any court to weigh the concreteness of a public figure plaintiff's case." See Appellants' Brief, p. 14.

First, this statement is simply unsupported in the law. Both the Circuit Court and the Court of Appeals accepted the sufficiency of the Affidavit and the statements of fact included therein, and in neither instance did the Appellants attempt to refute anything included in the Affidavit. As established by this Court, if an Affidavit presents sufficient proof to establish a prima facie case, the burden shifts to the opponent to provide rebuttal evidence. See Hubbard v. Ky. Bar Ass'n, 66 S.W.3d 684, 696 (Ky. 2001). This the Appellants simply did not do.

In addition, it is inaccurate, to say the least, for the Appellants to state that the Affidavit "makes no effort to address the facts upon which the Appellants base their opinions." See Appellants' Brief, p. 14. The Affidavit explicitly refuted all of the falsehoods included in the post, including with reference to independent sources:

> The Pikeville/Pike County Airport Board is audited by a fully qualified independent accounting firm each fiscal year and those results have confirmed that no accounting crimes have occurred regarding airport funds. These are provided to other governmental units as well as members of the media on an annual basis.
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> Hickman Aff., Appendix Tab 6, ¶5.

The Circuit Court accepted Mr. Hickman's Affidavit in its finding that he had made out a prima facie case for defamation. The Court of Appeals did not dispute the Circuit Court's acceptance of Mr. Hickman's unchallenged Affidavit, and it did not abuse its discretion in doing so.

Finally, the Appellants argue that, under a case from the Western District of Washington, a Plaintiff is required "to allege a valid cause of action, produce prima facie

evidence to support all elements of that cause of action and then for the Court to evaluate the strengths of the Plaintiff's case before a Plaintiff is permitted to unmask an anonymous Defendant." See Appellants' Brief, p. 16 (citing Salehoo Group, Ltd. v. ABC Co., 722 F.Supp.2d 1210 (W.D. Wash. 2010)).[5] The Appellee could just as easily direct this Court's attention to decisions from other jurisdictions that establish an even lower standard for identifying anonymous internet users that that established by the Court of Appeals. See, e.g., Hadley v. Doe, 34 N.E.3d 549, 556-67 (Ill. 2015) (in order to obtain the identity of an unidentified individual who may be liable to a plaintiff, the Court must determine if the plaintiff can overcome the standard for a motion to dismiss – it must be clearly apparent that no set of facts could be proved that would entitle the plaintiff to recovery). But these are not the standards our Court of Appeals adopted. The Court of Appeals very clearly did not direct that a plaintiff must demonstrate a prima facie case for all elements of its defamation claim, but instead directed that a prima facie case of facial defamatory statements and the falsity thereof be demonstrated, both of which Mr. Hickman has done.

III. THE STATEMENTS AT ISSUE ARE NOT PURE OPINION, AS THE CIRCUIT COURT FOUND AND THE COURT OF APPEALS CONFIRMED.

The Appellants next argue that the Circuit Court Order, accepted by the Court of Appeals, did not distinguish pure opinion from fact in finding that the offending posts are facially defamatory. See Appellants' Brief, pp. 16-17. What the Appellants fail to acknowledge, however, is that the Circuit Court did indeed undertake a "fact v. opinion" analysis, an analysis that the Court of Appeals reviewed and accepted as being in

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[5] This opinion was incorrectly cited in the Appellants' Brief. The citation above includes the correct volume reference.

conformity with its First Opinion. The Appellants may not like the result of that analysis, but they have not demonstrated that the Court of Appeals abused its discretion in accepting the Circuit Court's findings. As quoted above, the Circuit Court recognized that the statements at issue are not opinions based on objective facts, which might arguably enjoy a privilege.

For example, in the September 1, 2013 post by the anonymous poster known as "Honesty Lost Friday," the poster states, "Yes in my opinion you people stole the publics [sic] hard earned dollars to facilitate your elitest [sic] dreams." See Subpoena Order, Appendix Tab 4, p. 19. This statement falls clearly within the "informational opinion" category of opinions as described by the Appellants themselves in their Motion as occurring "when a person making a statement can be regarded as using the superficial form of an opinion to convey information which creates an inference that undisclosed facts exist to justify the opinions expressed." See Appellants' Brief, p. 19 (citing Prosser and Keeton, The Law of Torts §13A at 813-14 (5th Ed. 1984)). In this case, the use of the word "opinion" in conjunction with reference to stealing public funds – an inference that undisclosed facts exist to support that opinion – is not a privileged statement of pure opinion. It is an unsupported statement of defamatory fact, cloaked as "opinion" for the sole purpose of seeking protection. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("there is no constitutional value in false statements of fact"). Other illustrative examples of informational opinion included in the anonymous posts, and correctly identified as facially defamatory by the Circuit Court and the Court of Appeals, include:

- "The entire issue [appointment of Mr. Hickman to the Airport Board] stinks to the high Heavens and is probably the most brazen and arrogant

abuse of public office I have ever even hear of." Subpoena Order, Appendix Tab 4, p. 3.

- "Property appraisals were obviously manipulated and we, the taxpayers, took a multi-million dollar hit." Id., p. 4.

- "... there may be criminal activity involved in the transfer of airport holdings ... under the leadership of ... Mr. Bill Hickman. ..." Id., p. 5.

- "Later estimates put the self indulgent waste at more like ONE MILLION DOLLARS!" Id., p. 6.

- "I'm sure they knew it was a blatent [sic] LIE from day one, used to get public attention and political favoritism by dividing huge amounts of available money among arrogant political cronies." Id., p. 9.

- "Hickman and his suspiciously picked board had granted Blackburn's request gone against all obvious reason and sold the property to the city for something like 1/3 it's [sic] appraised value." Id., p. 12.

- "Does any of this smell like corruption? It sure smells bad to me for miles around the office of Hickman..." Id., p. 18.

As recognized by the Court of Appeals, these are not statements of pure opinion, the Circuit Court was correct in its application of the standard set forth in the First Court of Appeals Order, and in finding that under that standard the statements are facially defamatory. There was no abuse of the Court of Appeals' discretion in denying the relief requested by the Appellants in the Second Writ Proceeding on this issue.

IV. THE FINDING THAT THE SUBJECT STATEMENTS ARE FALSE WAS IN KEEPING WITH THE APPLICABLE LAW.

Mr. Hickman also presented a prima facie case that the statements included in the posts and at issue herein are false. Statements and innuendo regarding misuse of funds, theft and revenue diversion have been absolutely refuted in the annual audits of the Airport Board:

> The Pikeville Pike County Airport Board is audited by a fully qualified independent accounting firm each fiscal year and those results have

> confirmed that no accounting crimes have occurred regarding airport funds. These are provided to other governmental units as well as members of the media on an annual basis.
>
> Hickman Aff., Appendix Tab 6, ¶5.

Mr. Hickman has also confirmed under oath that statements regarding a pre-planned conspiracy to illegally take public property and money for personal gain and allegations that he is a thief, is dishonest, is an embezzler and has otherwise engaged in criminal activity are likewise false. See id., ¶¶2, 3, 4.

The Appellants' assertion that Mr. Hickman must, at this stage in the proceedings, "prove the falsity of the facts underlying the opinions offered" by the Appellants (Appellants' Brief, p. 20) is belied by the Appellants' own recitation of case law. See Appellants' Brief, p. 19 ("proof of falsity is part of the plaintiff's case in chief") (emphasis added) (citing Sullivan, supra, 376 U.S. at 280). The Circuit Court, applying the Court of Appeals' directives, did not task Mr. Hickman with proving his case in chief. He was properly tasked with presenting a prima facie case of facially defamatory statements, which he most certainly has done. See Subpoena Order, Appendix Tab 4, p. 2 ("Even if the Court believes there may be proof available to support the Defendants' unsupported counter-statement of facts, those issues are for a jury. This Court is to determine whether there is a *prima facie* case…").

Also as recognized by the Circuit Court and affirmed by the Court of Appeals, despite the facts as presented by Mr. Hickman through the Complaint, the various subsequent Motions and his sworn Affidavit, the Appellants have not presented one scintilla of evidence to refute those facts. As set forth in the various referenced pleadings, Mr. Hickman will demonstrate that all of the facts stated or implied by the

Appellants and other Unknown Defendants are indeed completely false. For example, Mr. Hickman was appointed to the Airport Board by the Mayor of Pikeville and the Pike County Judge Executive (as is the case with all Airport Board members) in December 2006 but did not attend his first meeting until March 1, 2007, and was elected Chair by a unanimous vote of the Board on June 1, 2009. See generally Complaint, Appendix Tab 1, ¶9.

At the time he was appointed to the Board, the biggest "issues" continuously raised by the Unknown Defendants as demonstrating Mr. Hickman's supposed corruption and undue influence were already in the works or indeed had already been decided – the negotiations for the sale of the Marion's Branch property were well underway when Mr. Hickman joined the Board, the decision to construct the T-Hangars started two years before Mr. Hickman became Chair, and the engagement of Rick Keene to provide engineering consulting services occurred long before Mr. Hickman was appointed to the Board. In addition, all Airport Board decisions require a majority vote of all members – the Chairman's vote carries no more weight than the vote of the other members – and in the great majority of cases the votes are unanimous and occur only after extensive, vigorous debate and compromise among the members. Mr. Hickman chose his hangar at the newly-constructed facility after all others – both existing renters and those on a waiting list – had selected their spots.

Finally, and as asserted to and accepted by the Circuit Court and the Court of Appeals, the proof in this case will demonstrate that the dollar figures thrown around by the anonymous posters as evidence of Mr. Hickman's corruption are greatly exaggerated. In other words, all of the basic assumptions that underlie the posts at issue are false, and

the accusations and falsehoods were nevertheless directed at Mr. Hickman in order to most inflame the public, given both Mr. Hickman's role as Airport Board Chairman but also because of his longstanding and previously-unsullied reputation as an acclaimed lawyer in Pike County. The Unknown Defendants, including the Appellants, knew they could do the most damage (get the most "bang for the buck") by hurling false, defamatory and highly damaging statements directly at a well-known, well-respected member of the Pike County community. The Circuit Court clearly recognized these facts, and recognized that Mr. Hickman is not required to prove his entire case in chief at this stage in the proceedings, and the Court of Appeals did not abuse its discretion in accepting those findings of the Circuit Court.

V. MR. HICKMAN WAS NOT REQUIRED TO DEMONSTRATE DAMAGE.

The Appellants acknowledge that in the First Court of Appeals Order, the Court "reasoned that it was difficult, if not impossible, for a public figure plaintiff to show that the persons responsible for facially defamatory statements acted" with knowledge of the falsity of the statements or reckless disregard for their veracity. See Appellants' Brief, p. 20 (citing and quoting Welch, supra, 3 S.W.3d at 731. The Appellants also acknowledge that, based on that analysis, the Court of Appeals also ruled "that a public figure defamation plaintiff must only show that language contains facially defamatory statements and those facially defamatory statements are false to present as prima facie case of defamation." See Appellants' Brief, p. 20. Remarkably, however, the Appellants then completely ignore this clearly-delineated standard and assert that the Appellee should have been required to demonstrate that he suffered actual or special damages. See id., pp. 20-21.

At the risk of repetition, the first problem with this argument is that the Appellants did not raise it when the First Court of Appeals Order was issued. As the Appellants obviously understand, they had an absolute right to appeal any or all of the holdings set forth in the First Court of Appeals Order to this Court. They chose not to do so, and cannot now be allowed to effectively appeal that decision one year later under the guise of a writ proceeding and subsequent appeal to this Court. The argument has been waived and should be disregarded.

Even if the argument had been validly raised, a point the Appellee does not concede, the argument nevertheless does not withstand scrutiny. The case law cited by the Appellants in support of their theory that proving a prima facie case for defamation in order to allow the plaintiff to discovery the anonymous speakers' identities is instead demonstrative of the standard that must be met before a defamation plaintiff can recover damages. The language from the Gertz case quoted by the Appellants is quite clearly related to the recovery stage of the underlying proceedings. For example, "the States may not permit recovery of presumed … damages." See Appellants' Brief, p. 21 (quoting Gertz, supra, 418 U.S. at 349 (emphasis added)). "[I]n the absence of such a showing, a defamation plaintiff is restricted 'to compensation for actual injury…'" Appellants' Brief, p. 21 (quoting Gertz, supra, 418 U.S. at 349 (emphasis added)). The Appellants' use of the Restatement of Torts is similarly premature: "The Restatement of Law of Torts 2d §621 and the comments hold that one who is liable for defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed..." Appellants' Brief, p. 21.

Additional language from the Restatement relied upon by the Appellants relates to the constitutional limitation on damages and is therefore applicable to the damages phase of the proceedings, after a Plaintiff has proved his case, and not to the initial stages of demonstrating a prima facie case for defamation has been made. The Appellants waived their argument that proof of actual or special damages should have been required as part of the prima facie showing to allow discovery of the Unknown Defendants' identities, but their argument nevertheless fails as applying to the end of a defamation proceeding, not the outset. Again, the Court of Appeals did not abuse its discretion in denying the Second Writ Proceeding as to this issue.

VI. THE ATTORNEY-CLIENT PRIVILEGE IS NOT IMPLICATED.

The Appellants conclude their Brief with the suggestion that disclosure of their identities would implicate the attorney-client privilege against disclosure of confidential communications. Mr. Hickman believes that the Circuit Court acted within its authority in ordering both the disclosure of the Appellants' identities and their posts, but also acknowledges that the posts for which the Appellants are responsible can be determined through discovery once their identities are known. However, to suggest that requiring counsel to identify the Appellants after a finding that they have no right to anonymity is ludicrous. Counsel routinely do, and must, assert in civil proceedings which parties they represent. The Circuit Court having found, and the Court of Appeals having agreed, that Mr. Hickman has demonstrated a prima facie case of defamation, and that Mr. Hickman is therefore entitled to know the identity of the Unknown Defendants, there is no reason that counsel for the Appellants should be shielded from revealing the identity of his clients.

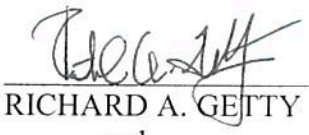
> [I]t is generally held that the identity of a client is not a privileged communication. ... "The name or identity of the client was not the confidence which the privilege was designed to protect; the statements of the client for the purpose of seeking advice from his counsel were the disclosures which were to be kept secret." This general rule, however, like most others, is subject to exception under unusual circumstances. ...
>
> Hughes v. Meade, 453 S.W.2d 538, 540-41 (Ky. 1970) (citations omitted).

None of the "unusual circumstances" cases cited in the Hughes case, nor the cases cited in the Appellants' Brief, apply in this case. For example, in the Baird case cited by the Appellants and by the Court in Hughes, the attorney sought to protect the identity of clients on whose behalf he had turned over unpaid income taxes. See Hughes, supra, 453 S.W.2d at 541 (explaining and citing Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960). In Ex parte McDonough 149 P. 566 (Cal. 1915), another case cited as an unusual circumstance in Hughes, the attorney had been employed by an undisclosed client to defend a criminal charge against another person. See Hughes, supra, 453 S.W.2d at 541. Finally, In re Kaplan, 168 N.E.2d 660 (N.Y.S.2d 1960) involved an attorney who had been retained to pass on to a public investigating body information concerning apparent wrongdoing by municipal authorities. See id. In each of these cases, "the transactions about which information had been given constituted in essence the performance of a legal service." This is not the case here, where the Appellants seek to have their identities protected in order to avoid answering civil claims and potentially facing civil liability. The Court of Appeals correctly rejected this argument asserted by the Appellants, and that decision should be allowed to stand.

CONCLUSION

The Court of Appeals very clearly set forth the two-part test to be applied by the Circuit Court in determining if Mr. Hickman has presented a prima facie case of defamation such that he is entitled to know the identity of the individuals who have posted about him on Topix. The Circuit Court took note of those directives and entered a thorough, detailed and well-reasoned analysis of the facts and the law, concluding that Mr. Hickman is indeed entitled to that identifying information. The Court of Appeals thereafter also conducted a thorough review of the Circuit Court's decision and found that it complied with the First Court of Appeals Order and that the Appellants had not met the extremely high burden for obtaining a Writ of Prohibition. The Appellants have not presented any compelling arguments that the Court of Appeals abused its discretion in denying the Appellants' requested relief in the Second Writ Proceeding, and the Appellee therefore respectfully requests that the Second Court of Appeals Order be allowed to stand as issued.

Respectfully submitted,



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